

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE ROBERT C. JONES, DISTRICT JUDGE
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4 ROCKWELL AUTOMATION, INC., :
5 :
6 Plaintiff, : No. 2:13-CV-1616-RCJ-NJK
7 :
8 -vs- : May 12, 2014
9 :
10 BECKHOFF AUTOMATION LLC and : Las Vegas, Nevada
11 BECKHOFF AUTOMATION GmbH, :
12 :
13 Defendants. :
14

11 TRANSCRIPT OF MOTION HEARING

13 APPEARANCES:

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1 RENO, NEVADA, WEDNESDAY, MAY 28, 2014, 10:00 A.M.

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3
4 THE COURT: Thank you, please be seated.

5 Let's see. This was in Rockwell versus Beckhoff.
6 Let's start with appearances here in the courtroom please.

7 MR. TANCK: Your Honor, my name is Paul Tanck
8 with the firm of Chadbourne & Parke on behalf of the
9 plaintiff, Rockwell Automation.

10 MR. FOLDENAUER: Aaron Foldenauer also with
11 Chadbourne & Parke on behalf of Rockwell Automation.

12 MR. FOUNTAIN: And Jonathan Fountain from Lewis,
13 Rocca, Rothgerber also on behalf of Rockwell Automation.

14 THE COURT: Thank you. Please.

15 MR. FEARS: Your Honor, Chad Fears from Snell &
16 Wilmer on behalf of defendants, and I have Peter Lancaster
17 here from Dorsey & Whitney also on behalf of defendants.

18 THE COURT: Okay. Thank you. We don't have
19 anybody on the phone, correct?

20 THE CLERK: No, sir.

21 THE COURT: All right. We have several motions,
22 of course, to file excess pages that I'll grant.

23 I don't think -- I want to hear your comments, but I
24 have difficulty in striking the affirmative defenses. I may
25 well require a little more clarification on those defenses. I

1 don't think they're complete enough under the *Twombly*
2 standard.

3 For example, as we'll get into when we discuss it, I
4 don't think you're delineating sufficient to defend against
5 invalidity or obviousness charges by citing specific sections
6 or subsections of those statutes so the plaintiffs know what
7 you're talking about when you're talking about those
8 allegations. We'll get to that briefly.

9 We also have a motion for preliminary injunction, of
10 course, and you do have to overcome those burdens that are
11 required, and several other motions as well.

12 So I'll let you proceed. Why don't you present your
13 motion for preliminary injunction, and then in response, of
14 course, the motions to dismiss or -- as well, you will need to
15 present the requests for greater clarification.

16 MR. TANCK: Your Honor, so prior to the hearing
17 the parties had discussed which of these motions should be
18 argued today and which motions are -- not necessarily need to
19 be argued today, and I think the parties agreed that the only
20 two motions that need to be argued today are the -- Beckhoff's
21 -- the defendants' motion to dismiss based on personal
22 jurisdiction and/or to transfer, which is docket number 51.

23 And the second motion to be argued today if
24 necessary would be docket 94 which is defendants' motion
25 for -- objection to the magistrate's denial of the motion to

1 stay.

2 The remaining motions that are before your Honor we
3 agreed would not be argued today because, for example, the
4 preliminary injunction motion that previously had been
5 brought, the parties had stipulated under docket number 52
6 onto an injunction that would be in place until the parties
7 renewed that application for a preliminary injunction so
8 therefore that does not need to be argued today.

9 And, likewise, the motions for excess pages would
10 not be argued today, and I think your Honor already ordered
11 how your Honor is going to order on that.

12 The other two motions, the motion -- plaintiff's
13 motion to strike, we weren't going to argue -- on the
14 affirmative defenses, we're not going to argue today, and,
15 likewise, our -- that's to strike the affirmative defense
16 and/or to strike the counterclaim.

17 So really I think what we're here today to argue in
18 front of your Honor is the two motions on the motion to
19 transfer, dismiss on jurisdiction and/or the motion for
20 objection.

21 THE COURT: Thank you. And without argument, I
22 may well resolve the other motions except the motion for
23 preliminary injunction.

24 You're telling me what regarding preliminary
25 injunction? You have a stipulation? For how long?

1 MR. TANCK: Until the parties -- so docket
2 number 52, the parties are stipulating as to an injunction
3 that would be in place, and there's a procedure in that
4 stipulation that sets forth, if the defendants want to be
5 released under that injunction, there's a briefing schedule
6 and such and so forth upon which that could be reargued and
7 determined whether it should be lifted or not.

8 So I don't have the dates in front of me, but I
9 believe it's a -- sort of a nine-week briefing period, three
10 weeks, three weeks, three weeks.

11 THE COURT: Maybe we better do that because my
12 inclination here was to deny the preliminary injunction. So
13 maybe we better do that.

14 Let's go to your briefing on that preliminary
15 injunction, on that issue, on that motion only, and we'll --
16 per your stipulation, we'll leave the injunction in place
17 until that happens.

18 MR. TANCK: Right.

19 THE COURT: And then I'll rule on it.

20 All right. The motions you want to comment on?

21 MR. LANCASTER: Sure. So the motion to dismiss
22 or to transfer, and then the motion to stay -- might I
23 approach the podium?

24 THE COURT: Would you, please.

25 MR. LANCASTER: And just a word on the

1 preliminary injunction motion. I mean, the parties are in
2 agreement on that issue, that there is no need to brief or
3 argue it and -- not just now, but until circumstances out in
4 the world change.

5 And I'll tell you what led the defendants to agree
6 to that. No -- not one of the machines at issue here, the XTS
7 machine, has ever been sold in the United States.

8 The Court did offer the ability to show the machine,
9 and then we were going to return on the selling machine for
10 the preliminary injunction motion.

11 The client is very conservative, your Honor. They
12 wanted to make sure that during the pendency of this case
13 there could be no plausible claim for damages, and so they
14 don't plan to sell any of these in the United States until
15 this case is resolved.

16 THE COURT: Okay.

17 MR. LANCASTER: So let me turn first, your
18 Honor, to the motion to dismiss or transfer.

19 So there's really three motions, motion to dismiss
20 the German company, GmbH, a motion to transfer the entire
21 case, whatever part of it remains, and then, third, a motion
22 to stay discovery which is an appeal from a magistrate order
23 pending a decision on the first two.

24 So the decision on the first two could moot this
25 last one. Obviously there wouldn't be anything to stay if the

1 Court resolves one way or the other these other motions, and
2 so, with the Court's permission, I would leave that issue to
3 the end and just deal with the first two which I think
4 probably do need to be resolved.

5 I would say as to the first two, though, motion to
6 dismiss GmbH, motion to transfer the whole case, if the Court
7 deemed it appropriate, it would be possible to transfer the
8 entire case and have a Minnesota court resolve the motion to
9 dismiss, but I'm sure the Court will have its own views on
10 that issue.

11 THE COURT: I'm disinclined to do that.

12 You have a stronger -- the reasons I'll give you
13 will be laid out in the order, but you do have a stronger
14 issue relative to jurisdiction.

15 I don't see that they've established the basis for
16 personal jurisdiction yet, but I'm sure that I'm required to
17 give them additional discovery time. For example, with
18 respect to Beckhoff Germany, clearly, I don't think they've
19 established it yet.

20 But simply by virtue of a common website, for
21 example, or some affiliation, not parent-child, of course, but
22 some affiliation, I don't think that's enough. But clearly I
23 have to give them jurisdiction.

24 With regard to Beckhoff itself, it's a gray area.
25 So I'll let you comment on those. But, of course, assuming

1 that I agree with you, I think the resolution is that I have
2 to allow discovery to continue for at least jurisdiction
3 purposes.

4 MR. LANCASTER: All right. Let me speak to that
5 issue.

6 And I'm going to refer to the defendants, if it's
7 all right, by the shorthand here, LLC, the U.S. company, or
8 GmbH or the German company.

9 THE COURT: One more background point is the
10 only imposition into the United States -- and you know there's
11 a difference between jurisdiction as opposed to somebody in
12 the United States as opposed to jurisdiction *in personam* over
13 them in some particular state.

14 The only imposition that we're really talking about
15 here when we're talking about special -- special personal
16 jurisdiction -- general jurisdiction might be pretty tough for
17 them to establish, but for special, we have to have an
18 imposition into either a forum state or into the United States
19 and illegal conduct, or proscribed conduct arising from that
20 imposition, and, of course, third factor, fairness generally
21 for taking *in personam* jurisdiction.

22 The only imposition that we're talking about in this
23 case is the Las Vegas show. And showing the item, you can't
24 claim jurisdiction over a website broadcast worldwide that
25 shows products, but if it's aimed particularly at the state of

1 Nevada or somewhere else, then, of course, you may.

2 Here the main problem is that the imposition, if at
3 all, was into a show, a tradeshow in Las Vegas.

4 So it seems to me that there's no need to transfer
5 it to any other venue. This is the imposition here in this
6 district. But I'm not sure how that gets *in personam*
7 jurisdiction over Beckhoff Germany.

8 Go ahead.

9 MR. LANCASTER: So let me speak first to the
10 show, your Honor.

11 At the time we appeared before the Court, no
12 infringing act had occurred in Nevada.

13 There were plans to show the machine in Las Vegas.
14 It did not happen, your Honor. The machine was never shown.
15 It was never used, it was never made, no infringing act ever
16 occurred in Nevada.

17 THE COURT: But the patent statute is a little
18 broader than that, isn't it? What is it, what are the words,
19 sell, market --

20 MR. LANCASTER: Sell, offer to sell, make, use,
21 not in quite that order.

22 THE COURT: Right.

23 MR. LANCASTER: So --

24 THE COURT: So an omnibus sell, doesn't that
25 include arrangements to allow sales, especially at a

1 tradeshow? Don't they have a right to -- do they have to wait
2 until you actually set up your trade booth before they can
3 file a lawsuit?

4 MR. LANCASTER: Your Honor, what we are looking
5 at is either today or at the time, and at neither time was
6 there any offer to sell ever in Las Vegas or anyplace else in
7 Nevada, and I don't think there's any case which has denied
8 transfer where there are no contacts in the end with Nevada.

9 So neither party is here, neither party has relevant
10 employees here, neither party -- certainly the defendants
11 don't have property here, no witnesses here. There is nothing
12 here including no -- everything you go through on the patent
13 statute, sell, offer to sell, make, use, none of those things
14 ever happened in Nevada.

15 And this, I think, your Honor, I could not find, and
16 the plaintiff could not find, any reported case anywhere where
17 there is no infringement and none of those other things and a
18 case stayed in a jurisdiction that is inconvenient for all
19 parties even including Rockwell.

20 And I -- one of the points that Rockwell made early
21 on in the case was, well, it won't be an inconvenience for
22 Beckhoff Germany because Beckhoff Germany would only have to
23 come to Nevada once for trial.

24 Well, that's already been proved wrong twice, your
25 Honor. They came from Germany for the TRO hearing, and we've

1 been ordered to appear for a settlement conference in two
2 weeks. The case is hardly half over, and that kind of
3 inconvenience already shows up, your Honor.

4 So I appreciate that lawyers' convenience doesn't
5 count for all that much in these debates, but appearing before
6 the Court -- and we're glad to have this opportunity,
7 depending upon how flights work, this is a three-day -- this
8 hour hearing or whatever it will be, your Honor, is a
9 three-day exercise for counsel. I assume it's a three-day
10 exercise for Rockwell's counsel.

11 Obviously I have skilled and highly competent Nevada
12 counsel, but both parties made the judgment early on that to
13 immerse Nevada counsel in technology that other lawyers
14 already had some familiarity with, particularly, at least on
15 our side, with the expectation the case would be transferred
16 to a forum that was more convenient, that didn't happen, and
17 so real world practically, it is extreme inconvenience for all
18 parties, and, again, the unique factor, no infringing act.

19 So I -- I do hope that the Court will consider those
20 issues. But, as I say, we could not find any case anywhere --
21 obviously there are cases where parties are going to show
22 something in the Nevada show, but a case where nothing ever
23 happened and zero, absolutely zero other contacts with Nevada
24 existed. We couldn't find any case.

25 This Court decided a case just a year or so ago

1 where it transferred a case in August 2013, and the Court
2 referred to the judicial emergency in this district, and I
3 understand that perhaps that's been alleviated somewhat, but I
4 very much -- I don't want to get in trouble with the judges in
5 Minnesota, your Honor, but I don't think that the judges here
6 have the burdens that this Court has.

7 We're up to pleading 122 --

8 THE COURT: We don't have that burden any more.
9 We have a full complement of judges, one judge is under
10 consideration for final appointment --

11 MR. LANCASTER: Good.

12 THE COURT: But otherwise we have filled all of
13 the vacancies.

14 MR. LANCASTER: Good.

15 So let me say a few things about the jurisdictional
16 motion if I could, and, your Honor, feel free to hurry me
17 along if what I'm saying seems obvious to you because I
18 appreciate that you're starting in what seems to us to be the
19 right place. Let me speak to the discovery issue, though.

20 The courts, I think, uniformly hold that when there
21 are disputed facts, a party defending against a motion like
22 ours is entitled to discovery. But, your Honor, there are no
23 disputed facts here.

24 There's no pleading that refers to any particular
25 aspect of jurisdiction. From the complaint you don't know

1 whether it's specific jurisdiction, general jurisdiction.

2 They've since conceded no general decision.

3 There's no distinction between the German company
4 and the U.S. company. There's no reference to Rule 4(k) (2)
5 which I think perhaps the Court was referencing early on, the
6 provision for potentially nationwide consideration of
7 contacts.

8 Nothing that could set a factual dispute was in the
9 pleading. One party, and only one party, submitted factual
10 material in connection with that motion. That party was
11 Beckhoff. Rockwell didn't submit anything. All the evidence
12 we're talking about is before the Court.

13 We are now more than eight months past the filing
14 date. Massive amounts of discovery have been undertaken by
15 Rockwell. Dozens upon dozens of interrogatories and document
16 requests -- we're well over a hundred by now. Not one that
17 I've seen relates to these jurisdictional issues.

18 If Rockwell thought that it needed jurisdictional
19 discovery, it had eight months and dozens of requests to seek
20 it.

21 We would submit, your Honor, that a party deserves
22 an opportunity to take discovery when there's disputed issues,
23 but when there's no disputed issues, and when it's had eight
24 months of opportunity, that opportunity doesn't go on forever,
25 particularly when, on the side, is working as hard as it can

1 to extract information from a party that we believe has due
2 process rights that are being infringed.

3 So certainly other discovery should not be going on
4 while that consideration occurs, and, your Honor, as I say,
5 the cases say that -- also say that when there is no disputed
6 fact, there is no need for discovery.

7 But let me turn if I could, your Honor, to a little
8 bit of the merits because there are two basic distinctions
9 here that Rockwell's entire briefing does its best to blur.

10 One is what you would think would be the very simple
11 distinction we've already talked about, the distinction
12 between the U.S. LLC and the German GmbH, and this fact has
13 been stated about a dozen times in our papers now, but we
14 still have difficulty persuading Rockwell from not lumping
15 them together for the jurisdictional argument.

16 We are not making a motion to dismiss for the LLC,
17 only for the German company, and the strongest authority for
18 that distinction is the Supreme Court case, the *McIntyre* case
19 that we cite from 2011 where that case held, on facts much
20 better for the plaintiff, and facts that are not going to
21 change through discovery, much better for the plaintiff than
22 any facts that Rockwell has, that, as a constitutional matter,
23 there was no jurisdiction.

24 In that case, a plaintiff had been injured by a
25 machine. The equivalent of patent infringement had occurred

1 there; doesn't exist in this case.

2 There it was a distribution contract with another
3 party for distribution of the foreign company's products
4 throughout the United States. That's the same as here.

5 In that case, the defendant, the foreign defendant,
6 had attended multiple tradeshowes relating to the product at
7 issue. That has not happened here, your Honor.

8 And in that case the Court found that up to four
9 machines had been sold, sold, in the forum state, and the
10 Court found that the constitution prohibited jurisdiction over
11 that foreign defendant, and, again, your Honor, that plaintiff
12 had a much stronger case than Rockwell has.

13 Now, Rockwell never comes to grips with that case.
14 Instead, they simply say, oh, well, the stream of commerce
15 theory got rejected in that case, and that's true, it did, but
16 the reason that plaintiffs try to argue -- base arguments on
17 the stream of commerce theory is that without it they have no
18 plausible jurisdictional argument anyway.

19 That's the last -- was the last resort for a
20 plaintiff who had no basis for jurisdiction. That last resort
21 is gone.

22 And the Court didn't just say -- the Supreme Court
23 didn't just say, well, we're rejecting the stream of commerce
24 theory, this is how it closed its opinion.

25 "New Jersey is without power to adjudge the

1 rights and liabilities of *J. McIntyre*, and its
2 exercise of jurisdiction would violate due process."

3 That case we believe, your Honor, controls this case
4 except for one issue, the 4(k)(2) issue, which I'll turn to in
5 a moment.

6 If the Court would grant me the indulgence of doing
7 a peculiar thing, I would like to point to Rockwell's best
8 pieces of evidence, the evidence that they cite over and over
9 again, to say that the German company should be subject to
10 jurisdiction.

11 And, again, the two distinctions that Rockwell
12 ignores repeatedly, the distinction between the LLC and the
13 GmbH, and the distinction between general jurisdiction and
14 specific jurisdiction, Rockwell's burden is to show a
15 connection between GmbH and the XTS in the United States.

16 So I would like to show you what they have in that
17 regard; three documents. Again, all of these documents
18 provided by defendants. Rockwell didn't provide anything that
19 might create a fact issue, and, with the Court's permission,
20 I've put these three documents on the ELMO.

21 So what I have put in front of the Court here is
22 Exhibit C, which happens to be Document 23-1, Exhibit C, which
23 is the marketing materials for the XTS, and these are the
24 kinds of materials that are available from the GmbH website.

25 You see a copyright notice for GmbH. This specific

1 example did not come off the website, but, as I say, pretty
2 similar, maybe identical materials are on the website.

3 These are materials that are used by the LLC. The
4 undisputed evidence is that the LLC runs the operations in the
5 United States. The undisputed evidence is that it was the LLC
6 who was planning to show the XTS in Las Vegas.

7 This cannot create jurisdiction over GmbH, your
8 Honor, any more than a website can, any more than if -- let's
9 go back to the *J. McIntyre* case. The defendants' machines
10 ended up in New Jersey. If that doesn't establish
11 jurisdiction, the fact that a document copyrighted by a
12 foreign company ends up in the United States cannot establish
13 jurisdiction. If the machine itself doesn't, a document
14 mentioning the machine couldn't possibly do it.

15 That's one of Rockwell's three favorite exhibits.

16 Let me show you their number one favorite exhibit.
17 This, again, is not a document provided by Rockwell, a
18 document provided by Beckhoff.

19 Now, this is not a press release. This is a news
20 posting by somebody else not affiliated with Beckhoff. This
21 is pure hearsay if offered for the truth of the matter. It's
22 not evidence at all.

23 But what this article is about is Beckhoff LLC in
24 Minnesota had an open house because it was moving to a new
25 building, and the language here that Rockwell points to is

1 language at the end of the article that is attributed to a
2 person named Gerd Hoppe. This, by the way, is -- this is all
3 part of the same filing, 23-1.

4 And at this open house the XTS -- in Minnesota, the
5 XTS was shown, and there is a quote that is attributed to, so
6 far as I know, the sole person who has worked for both
7 companies, that's Gerd Hoppe who is cited there.

8 And so Gerd Hoppe, who actually came to Minnesota to
9 set up the U.S. company, Gerd Hoppe, naturally enough, went to
10 the open house, and he said a few words according to this
11 hearsay document, although I could imagine him saying this.
12 He said a few -- is quoted as saying a few words in this
13 hearsay document about the XTS. That cannot itself establish
14 jurisdiction over the entire company in the United States.

15 One other document, your Honor. That document is
16 cited -- and I call it out partly because it was mentioned by
17 the magistrate in one of her orders. That document is cited
18 over and over again.

19 And then finally, and perhaps most important, the
20 document that announced the Las Vegas show. This is another
21 document cited over and over again by Rockwell, again, your
22 Honor, submitted by Beckhoff, not Rockwell, advertising a
23 party that they're putting on at the PACK EXPO, what led us
24 here.

25 But the key point, your Honor, is this is not a GmbH

1 show, this is an LLC show, and this document makes clear that
2 that's what it is. This document, which talks about the show
3 and the machine, is an LLC document.

4 I would ask, your Honor, that you apply the same
5 rule to both parties here. There is no need to accept our
6 factual assertions if they're not backed up by a document.

7 A statement that a lawyer might make in a paper or
8 in a courtroom does not create a factual issue. I've shown
9 those documents to the Court rather than just talk about them
10 so there wouldn't be any dispute about them.

11 Let me say a word about Rule 4(k)(2) which is the
12 sole difference between -- that could draw a line between the
13 *McIntyre* governing authority and this case, and in this case
14 it doesn't work, your Honor.

15 First, as I already mentioned, absolutely no
16 reference to Rule 4(k)(2) in the complaint. When we filed our
17 motion, we had no idea they were going to rely on it.

18 The whole concept of the rule is inapplicable here,
19 your Honor, and the reason that it's inapplicable is that it
20 was set up to apply when there were contacts in lots of
21 different states but not enough in any one state to support
22 jurisdiction, and I'm not just making that up. The notes to
23 the rule make that clear, the formal reported notes to the
24 rule.

25 In this case, there is no collection of contacts

1 relating to the XTS that goes beyond what the Court has
2 already seen. There isn't any collection of contacts that
3 could support Rule 4(k)(2).

4 Now, it's probably not just accident, your Honor,
5 that since that rule was put in place in 1993, so far as we
6 know, and so far as Rockwell has been able to find as well,
7 not one single Ninth Circuit case has sustained jurisdiction
8 based upon 4(k)(2), and the notes to the rule provide some
9 indication of why that might be.

10 They quote a United States Supreme Court case that
11 says, quote,

12 "Great care and reserve should be exercised
13 when extending our notions of personal jurisdiction
14 into the international field." Close quote.

15 The burden is even higher when you're talking about
16 a foreign company. In 1996, the Ninth Circuit, in the *AT&T*
17 case that's cited in our papers, shortly after the rule came
18 out, made clear it's not enough to show a minimum contact
19 somewhere in the United States.

20 What that case said was, quote, "significant
21 nationwide contacts," close quote, must exist, but,
22 nonetheless, the company is not subject to jurisdiction in any
23 particular state; "significant nationwide contacts."

24 There is just no plausible basis, and no amount of
25 discovery is going to change that fact, your Honor, even if

1 over the last eight months Rockwell had taken upon itself to
2 do that.

3 THE COURT: Now, again, you're just simply
4 arguing relative to Beckhoff Germany, not the LLC.

5 MR. LANCASTER: Absolutely, your Honor.
6 Absolutely, your Honor.

7 THE COURT: All right.

8 MR. LANCASTER: And so let me talk for just a
9 second about the kind of fair and reasonableness issue. The
10 Court referenced it.

11 In this case, Rockwell can get all the relief that
12 it needs from the LLC. The undisputed evidence is that only
13 the LLC conducts U.S. operations.

14 The stipulation is in place. It's not going to sell
15 machines, and there's not going to be any worry about a deep
16 pocket because there will be zero sales before this matter is
17 resolved. For that reason, all the relief that Rockwell needs
18 is available from the LLC without violating the constitutional
19 rights of GmbH.

20 Let me mention, your Honor, that this is a case --
21 although, as I say, there's already been more than 120 filings
22 in it, this is a case that should be a small case that has
23 turned incredibly messy and complicated.

24 Here's why it should be a small case.

25 Every patent at issue in this case expires in 2018.

1 There are no damages because there's no sales.

2 We -- I imagine the Court could picture, perhaps at
3 the appellate level, a fight over this case extending into
4 2016. By the time that's done, there will be two years left
5 on this patent, all of these five patents.

6 For all those issues, your Honor, the LLC gives
7 Rockwell all the relief that it needs.

8 One last point, your Honor.

9 THE COURT: And what is that?

10 MR. LANCASTER: Well, if it's right, an
11 injunction, an injunction lasting to 2018.

12 THE COURT: So you're willing to stipulate to
13 that.

14 MR. LANCASTER: What I'm willing to stipulate --

15 THE COURT: Only after litigation.

16 MR. LANCASTER: Well, that remains up in the
17 air. But as we speak today, there is a stipulation, and what
18 I'm saying -- a stipulation that no sales will occur, and what
19 I'm saying is that will not change until this Court decides
20 that that's inappropriate either at a final trial or some
21 other mechanism --

22 THE COURT: So I don't understand what you're
23 offering. You just said they have all the relief they need.
24 What relief are you offering?

25 MR. LANCASTER: What I'm saying, your Honor, is

1 that they gain nothing further by having GmbH in the case. If
2 they want an injunction until 2018, having GmbH in the case
3 has no impact on that. That's what I'm saying.

4 They get -- the presence of LLC -- of the LLC gives
5 them everything they could possibly need, whether it's
6 litigated or not, your Honor, because there's -- the GmbH is
7 not going to be making any sales in the United States.

8 THE COURT: So I'm not requiring an answer right
9 now, but I will push you for a further answer because it may
10 obviate the necessity of going further in the entire case.

11 If the Court concludes that all I can retain
12 jurisdiction over is LLC, do you want to go to litigation on
13 that, or are you willing just to say LLC will not sell until
14 2018?

15 MR. LANCASTER: You know, my personal answer on
16 that question may not yet be exactly the same as my client's
17 answer, and as I stand here today, I cannot give you a
18 definitive answer.

19 THE COURT: I'm just throwing out the question,
20 that's all.

21 MR. LANCASTER: I happen to have a very strong
22 opinion on the topic myself. I don't like charging my client
23 \$2 million, or whatever it's going to be, for nothing.

24 THE COURT: Right.

25 MR. LANCASTER: And so that is an issue that we

1 are discussing, but I cannot tell you that it's resolved, your
2 Honor.

3 THE COURT: Okay. So I've posed the question,
4 and I'll just ask you at some point.

5 MR. LANCASTER: Let me just make one last point
6 about the presence and the lack of need for GmbH.

7 If what is important to Rockwell is having some
8 lawsuit against GmbH, it has already done that. It sought a
9 TRO against GmbH in Germany. There was no argument about lack
10 of jurisdiction. The parties briefed that extensively.

11 For reasons that perhaps Mr. Tanck can explain, that
12 case was dropped without GmbH providing anything, unilaterally
13 by Rockwell, but that's where litigation involving GmbH should
14 occur, where Rockwell started and, for its own reasons,
15 stopped a lawsuit. It doesn't need to be present here.

16 So, your Honor, subject to further questions that
17 the Court has, that's all that I have now.

18 I would ask yet again that when the Court listens to
19 Rockwell and hears about this contact, supposed contact, and
20 that contact, the Court consider what evidence actually lies
21 beyond it and behind it, and this basic pair of distinctions
22 that this entire motion rests on, one, LLC versus German GmbH,
23 and general jurisdiction versus specific jurisdiction that has
24 to be tied to the XTS.

25 THE COURT: Thank you.

1 MR. TANCK: Thank you, your Honor. Again, this
2 is Paul Tanck on behalf of Rockwell.

3 Mr. Lancaster made a number of points. I'm going to
4 try to address them in no particular order just as I've
5 written them down.

6 I think the most stunning thing that Mr. Lancaster
7 said was that Beckhoff has committed no infringement in
8 Nevada, and he cited the patent statute, and every time he
9 said that the defendants haven't committed an --

10 THE COURT: Beckhoff LLC?

11 MR. TANCK: Beckhoff LLC or Beckhoff GmbH.

12 Importing an XTS system, accused infringing system,
13 into the District of Nevada is an infringement under the
14 patent statute.

15 And, in fact, we know that that machine was here in
16 Nevada. If your Honor recalls, back eight months ago when we
17 were here we asked your Honor that the machine that was
18 sitting in Nevada at the time be kept in the United States and
19 that that machine be available for inspection sometime down
20 the road. So that machine was brought into Nevada, and that
21 is an infringement under the patent statute.

22 Importantly, that machine, that XTS machine, isn't
23 designed, developed, manufactured by LLC, the U.S. entity,
24 it's designed, developed and manufactured by the German
25 entity.

1 And the -- let me tell you some other things that I
2 think Mr. Lancaster got wrong. This -- well, let me take a
3 step back.

4 The practical point here is why is GmbH fighting so
5 hard to get out of this case, and the reason why -- the
6 practical point of why they want to be out is because they
7 don't want the discovery to be had on the XTS system.

8 Again, GmbH, the German entity, is the entity that
9 designed, developed, manufactured and has all the documents
10 relating to how the system works.

11 They want to get out of the case so that we cannot
12 get discovery, so we cannot get to the merits of whether the
13 XTS system actually infringes Rockwell's patents. That's the
14 practical point.

15 Now, whether that's the practical point or not, let
16 me tell you why there is jurisdiction over GmbH in the United
17 States.

18 We argued this already in front of the magistrate
19 judge, Judge Koppe, earlier in January on Beckhoff's motion to
20 stay discovery while pending these motions, and what we argued
21 to the magistrate judge, and what the magistrate judge found
22 was that under both 4(k) (1), which is specific jurisdiction,
23 there was contact sufficient that likely there would be
24 personal jurisdiction over GmbH in Nevada, and also, in the
25 alternative, under 4(k) (2), which is the federal long-arm

1 statute, there would also be jurisdiction over GmbH, the
2 German entity, in Nevada.

3 And the reason why -- and let me first go to the
4 4(k)(2) point. Under 4(k)(2) there's three elements to show
5 jurisdiction under the federal long-arm statute. The first
6 element is, is this a federal question, and here it's
7 undisputed, this is a patent case, and that element is met.
8 It's a federal question.

9 The second element is whether or not the defendant
10 is not subject to jurisdiction in any court of general
11 jurisdiction. At that hearing Mr. Lancaster stood up, and at
12 the direct questioning of Judge Koppe, he admitted that there
13 is no general jurisdiction over GmbH, the German entity, in
14 any state court.

15 She asked -- Judge Koppe asked Mr. Lancaster are
16 there any -- any 50 states where there would be jurisdiction,
17 and Mr. Lancaster said no. So that element is met.

18 And, also, Judge Koppe in her order pointed out that
19 if a defendant contends he cannot be sued in a forum state, he
20 must then identify where suit is possible, and defendants
21 haven't -- GmbH hasn't identified another state in which this
22 case could have been brought.

23 So the final element under the federal long-arm
24 statute is whether or not the exercise of jurisdiction
25 comports with due process based on defendants' contacts with

1 the United States as a whole, and let me tell you about some
2 of those contacts.

3 And your Honor pointed out earlier that this was
4 a -- maybe a common website case, or, you know, an affiliation
5 case, but there's so many more contacts than that.

6 And I think, if you remember, if you recall back
7 eight months ago when we were here, the jurisdiction point was
8 argued by defendants at that point, and your Honor at that
9 point said, well, if GmbH ships this product into the United
10 States, then I'm going to have jurisdiction.

11 And, your Honor, GmbH, besides designing, developing
12 and manufacturing the XTS, directly shipped that XTS system
13 into the United States which was then transported to Nevada
14 which was here at the time of the hearing when we were here
15 eight months ago.

16 That contact is a specific jurisdictional contact.
17 Shipping into the United States is a violation of the patent
18 statute.

19 Secondly, this XTS system was displayed at various
20 tradeshow and at -- it was showcased at at least two places
21 in the United States, one at a PACK EXPO in 2012 which GmbH
22 employees attended, and then it was also displayed where
23 Mr. Lancaster put the article up on the board, on the ELMO, in
24 Minnesota at the -- at a -- at an event to showcase the XTS
25 system. Again, GmbH was present at that showcasing.

1 So we have an importation, we have a use -- these
2 two different exhibits, those are both infringements under the
3 statute, and then we also have the vigorous promotion of the
4 XTS system.

5 GmbH produced -- creates marketing materials, they
6 create manuals, and they create also videos on the XTS system.
7 These were all brought into the United States and sent to
8 their U.S. sales team.

9 And this is all -- has been outlined in Judge
10 Koppe's order where she pointed out that in May 2012 Beckhoff
11 GmbH sent XTS system brochures to its U.S. sales team and its
12 videos to the U.S. sales team. Beckhoff Automation GmbH's
13 corporate manager showcased the XTS system in Minnesota.

14 So this is not just a common website case. This is
15 actually the GmbH entity designing, developing, manufacturing
16 and directly shipping in -- the unit to the United States to
17 be showcased where they were present, and by their
18 commonly-owned subsidiary, essentially, because that's how
19 they hold them out on the website. If you look at the
20 website, they say we have the headquarters in Germany and our
21 subsidiaries in the U.S.

22 The *J. McIntyre* case that Mr. Lancaster cited to you
23 in order to distinguish this point on specific jurisdiction,
24 first of all said it is binding precedent on this Court.

25 Well, in fact, the *J. McIntyre* opinion was a

1 plurality opinion, and a plurality opinion is not binding law
2 on this Court, first of all.

3 But, more importantly, let's talk about what the
4 *J. McIntyre* case was about. In that case, most importantly,
5 the court found that the distributor in the United States that
6 *J. McIntyre*, the foreign entity, was using was an
7 unaffiliated, independent distribution. It was not a
8 commonly-owned, controlled, held out to be one worldwide
9 company, and that's a significant fact in the differences
10 between the facts in the *J. McIntyre* case and the facts here.

11 More importantly in the *J. McIntyre* case, as well,
12 that was a case involving products liability in New Jersey.
13 This is a patent case. Under 4(k)(2), we're arguing
14 jurisdiction. These elements were not argued and are not
15 dispositive -- I'm sorry, are not illuminated in the
16 *J. McIntyre* case.

17 So that case is not binding on this Court. It
18 didn't involve a commonly-owned, related distributor, and it
19 didn't involve a patent infringement case and jurisdiction
20 under 4(k)(2).

21 Another point Mr. Lancaster made was that your Honor
22 should be compelled that the Ninth Circuit has never found
23 jurisdiction under 4(k)(2), and I found that somewhat odd that
24 Mr. Lancaster would argue Ninth Circuit cases when we're
25 arguing personal jurisdiction.

1 As your Honor knows, personal jurisdiction is
2 governed by federal circuit law in patent cases, not regional
3 circuit law. So I think it would be hard pressed to find a
4 4(k) (2) case in any jurisdiction related to patents in
5 regional circuit law because all those cases are going to be
6 in the federal circuit under federal circuit personal
7 jurisdiction law.

8 And, in fact, we cited many cases in our briefing
9 where 4(k) (2) jurisdiction was held in a patent case, and I
10 give the one example of the *Synthes* case, S-y-n-t-h-e-s, which
11 found federal long-arm statute jurisdiction over a defendant,
12 a foreign defendant, with facts very similar to the ones in
13 this case.

14 Just a few more points.

15 Mr. Lancaster also argued that the only relief we're
16 seeking or that we can get in this case is an injunction.
17 While we are seeking an injunction, Mr. Lancaster is ignoring
18 the fact that price erosion damages, which have occurred
19 already in this case, and lost profits that have occurred in
20 this case, can also be sought, and we will be seeking those
21 damages. So it's not just an injunction, we go away.

22 In fact, we're going to seek damages, monetary
23 damages, under price erosion and lost profits analysis.

24 And, for example, under price erosion, we offer our
25 product for \$100,000. Beckhoff offers their product for

1 \$50,000. Our customers find out, well, why are you selling
2 your product for \$100,000 when they've offered for sale -- or
3 they've offered it for sale for \$50,000. I'm not going to buy
4 yours for \$100,000. Once you drop your price, I'll buy yours.

5 That sort of -- even without selling their product,
6 that sort of price erosion can happen and has happened.

7 And so this brings me to the next point, your Honor,
8 of why this case should be here.

9 Not only should this case be here because there's
10 jurisdiction over the parties and because we've been
11 litigating here, but, more importantly, it's Beckhoff's duty
12 or defendants' burden to show that there's a more convenient
13 venue, and they haven't done that.

14 They've cited the transfer elements, but they
15 haven't cited any witnesses, any sources of proof. They just
16 say that there's sources of proof and there's witnesses
17 elsewhere, but they haven't identified those.

18 And if you look at our briefing, your Honor, they
19 have to meet that burden and specifically call out the
20 nonparty witnesses that can't travel to this venue, and they
21 have to specifically call out the sources of proof that can't
22 be brought to this venue, and that's their burden, and they
23 haven't met that.

24 And I think your Honor already appreciated that the
25 importation, the vigorous promotion, and events that occurred

1 here is why we should be here.

2 Now, I go back to the point also on the price
3 erosion. We have a number of orders in this case already,
4 including your Honor's order to keep this XTS system in the
5 United States so it can be inspected.

6 And we have another order by your Honor that we
7 stipulated to that the parties, Beckhoff LLC and Beckhoff
8 GmbH, would not offer to sell, use the XTS systems in the
9 United States. But both of those orders have been violated,
10 admittedly, by defendants since your orders have been issued.

11 And I -- if I can hand up to your Honor two stacks
12 of paper here that detail the violations of these orders -- if
13 I may I approach.

14 THE COURT: No, thank you, but you may refer to
15 them.

16 MR. TANCK: Sure. Okay.

17 So we have one instance where Beckhoff LLC, after
18 your Honor ordered and the parties stipulated they would not
19 offer to sell the system, Beckhoff LLC, one of their
20 employees, offered to sell -- offered a price quote to a
21 customer in violation of the order. We're currently seeking
22 discovery on that issue.

23 But this is exactly what we were afraid of, that
24 Beckhoff is going to our customers and going to the market and
25 putting out price quotes for this allegedly infringing system

1 in order to drive the price of our product down, or it's
2 having the effect of driving our price down.

3 And so this is a violation of this order. We're
4 seeking discovery on it, and once we get a full picture of
5 what's going on and the damage that has occurred, we're going
6 to raise those issues if necessary with the Court.

7 So it's another reason to be here because there's
8 orders of this Court that have already been ordered and have
9 been violated.

10 But the second one, your Honor, the one where it
11 has -- your Honor said to keep the XTS system in the United
12 States so it could be inspected, we have found out that in
13 transportation of the XTS system from Nevada to Minnesota
14 where they were moving the XTS system, the XTS system was
15 damaged and potentially inoperable.

16 So the very infringing thing that we need to inspect
17 that caused the harm is now damaged and may not be repairable.
18 So we asked the defendants, well, what's the situation, can
19 we --

20 And they said here's the deal, you can come to
21 Minnesota and inspect the damaged machine and, if it works,
22 great. If it doesn't work, too bad, you don't get another
23 chance to inspect it, and we're not going to let you go to
24 Germany and inspect it there, and we're not going to bring
25 another one here.

1 The second option you have is you can go to
2 Germany -- you can forego seeing it in Minnesota, you can just
3 go to Germany on your own dime and see it there if you like.

4 Obviously, your Honor, they had an obligation to
5 keep the XTS system in the United States for inspection, and
6 they haven't lived up to that obligation.

7 And so once we get to the bottom of that situation,
8 and whether they violated that order, we're then going to
9 return to your Honor to get a resolution on how and when that
10 inspection should occur and under what circumstances, whether
11 they're going to have to pay for us to go to Germany, or
12 whether they're going to bring another one here to the United
13 States.

14 But my point being is these two orders are orders of
15 this Court. This Court is very familiar with the issues.
16 There's no reason to start transferring this case to another
17 jurisdiction and starting all over, especially in the fact
18 that they haven't shown there's a compelling reason to have
19 this case anywhere else.

20 I want to also raise the jurisdiction discovery
21 point. Mr. Lancaster stated that while there's been lots of
22 discovery in this case, we haven't sought jurisdictional
23 discovery, and we've waived our right to get jurisdictional
24 discovery.

25 Obviously your Honor's inclination at the beginning

1 was if jurisdiction couldn't be found, we would at least be
2 entitled to jurisdictional discovery, and the case law we
3 cited in our brief states as much, that it would be reversible
4 error not to give us discovery.

5 And, in fact, we -- from the very first briefing
6 when we responded to the motion to dismiss on jurisdiction, we
7 requested jurisdictional discovery. It's right in our
8 briefing.

9 And the reason why we haven't pursued heavily
10 jurisdictional discovery in the meantime is because we
11 didn't -- we're not going to seek and spend money on
12 jurisdictional discovery when we may not need it.

13 So if your Honor thinks that there isn't sufficient
14 detail in the record, and if we haven't shown a prima facie
15 case of personal jurisdiction, which is all we have to show,
16 then we are entitled to jurisdictional discovery. So I wanted
17 to make that point.

18 And the reason why there's been so many pleadings
19 and so much discovery and so much battle in this case is not
20 because of Rockwell, it's because the defendants at every turn
21 have been stonewalling discovery.

22 And if you just look back in the docket of how many
23 times we've been compelling discovery, getting orders,
24 reconsideration, objections to orders, and then just flat out
25 denying the discovery that we're trying to get, that is why

1 things are multiplying in this case.

2 And that is why -- the practical point, again, why
3 GmbH wants to be out of this case, because they don't want to
4 give us the discovery.

5 And they make arguments that, oh, you just want to
6 see our crown jewels, you want to get discovery because you
7 want to learn about our product, and your product is so
8 insufficient and not complete, and this is why you sued us
9 because you want to get the discovery.

10 And these are obviously arguments courts hear all
11 the time and quickly dismiss because there's a protective
12 order in place and that only the appropriate people see what
13 needs to be seen and attorneys' eyes designations and outside
14 attorneys' eyes designations.

15 The reason we're not getting the discovery is
16 because they don't want to give it to us because they know, if
17 they give it to us, we'll get the information we need to
18 continue on with the case.

19 So with those points, your Honor, I think -- I
20 think -- I just -- I think, again, if you look at the
21 briefing, I think it's very substantial, and I think it really
22 lays out the points very clearly.

23 And if you look at Magistrate Judge Koppe's order, I
24 think it lays out the jurisdictional arguments under 4(k)(1)
25 and 4(k)(2) very cleanly, and if -- if -- if -- again, if your

1 Honor, thinks we haven't made a prima facie showing, we would
2 be entitled to jurisdictional discovery.

3 THE COURT: Thank you.

4 MR. TANCK: Thank you, your Honor.

5 THE COURT: Anything else?

6 MR. LANCASTER: I do have just a few points,
7 your Honor.

8 As I think I predicted, the Court did not see one
9 piece of evidence that could support jurisdiction over GmbH.
10 It did not see any allegation that might support jurisdiction
11 over GmbH.

12 We did hear one supposed quote of the record that
13 counsel relies on, and that quote supposedly occurred in front
14 of Judge Koppe.

15 And what counsel said, as perhaps the Court recalls,
16 the representation was Judge Koppe asked me is there
17 jurisdiction anywhere over GmbH, and I answered no is the
18 representation.

19 This transcript, it's page 9 of the transcript.
20 That shows that the one time Rockwell purported to point to
21 the record it got it totally wrong. That's why we're asking
22 the Court not to rely on counsel's statements.

23 In fact, question:

24 "Is it the position of GmbH that there's no
25 personal jurisdiction over GmbH in any of the

1 district courts in this country?

2 Answer, "There is no general jurisdiction
3 anywhere," a proposition Rockwell doesn't even
4 challenge.

5 I go on to say,

6 "Here's a hypothetical -- possible
7 hypothetical case in which there could be specific
8 jurisdiction. This Minnesota company gets in a
9 contract dispute," that's LLC, "contract between the
10 two companies," there is a distribution agreement
11 just as there was in *J. McIntyre*, "and somehow that
12 gets litigated or started in Minnesota.

13 "Then a dispute where there's specific
14 contacts directly relating to that contact, perhaps
15 there could be specific jurisdiction in that case.
16 That's not this case, your Honor."

17 That, again, is why we think it's appropriate for
18 the Court to look at the actual record to see if there are any
19 disputed facts. There are not, and there isn't any reason to
20 keep GmbH in the case.

21 Now, counsel indicated that the law is that if the
22 defendant doesn't identify a specific court where there is
23 jurisdiction, then 4(k)(2) comes into play. But that's not
24 what the federal circuit -- what was identified as the
25 governing circuit says.

1 What the federal circuit says in the *Synthes* case
2 that was cited, and I'm reading from 1296 of that case, is
3 that,

4 "We leave for another day a determination as
5 to whether the plaintiff or defendant bears the
6 burden of fulfilling the second requirement of Rule
7 4(k) (2)," the issue that counsel was talking about.

8 That is not a settled issue as the federal circuit
9 has said.

10 Now, there's another extremely significant
11 representation that you heard, your Honor, this one purporting
12 to quote Section 271, the federal infringement statute, and
13 you heard the emphatic point being made that relates to
14 importation into Nevada.

15 Here's what the statute actually says over and over
16 again. It says it in 271(a), 271(c), 271(e), 271(g), imports
17 into the United States.

18 Your Honor, it's never -- I've never heard that
19 argument being raised before so I haven't done any exhaustive
20 research, but that statute was grossly misquoted, your Honor,
21 and the point -- as I say, that importation from one --
22 movement from one state to another, which incidentally was not
23 by GmbH but by LLC, is -- what is triggered by that is not
24 consistent with statutory language.

25 Now, I always hesitate to haul out a cliché as

1 burdened down as this one is, but, your Honor, the story about
2 the boy who murders his parents and then pleads for mercy
3 because he's an orphan applies here.

4 Rockwell says the case should stay here because this
5 Court has listened to this argument and an hour or two of
6 argument before, because we have made 120 plus filings.
7 That's backwards, your Honor. No party whose constitutional
8 rights are being violated should be asked to file 120
9 pleadings in a court.

10 Your Honor, within the next couple of weeks there
11 will be argument over what was referred to accurately as the
12 crown jewels of GmbH, its source code.

13 If this Court were to delay its ruling but permit
14 discovery to continue, some of the very rights that the
15 constitution is meant to protect would be abrogated.

16 That -- Rockwell says, well, we want GmbH in the
17 case so that we can get discovery from it. That's what the
18 due process clause is intended to prevent.

19 They've already had massive discovery from it in
20 violation of GmbH's rights. They should not have more, your
21 Honor, and for that reason we ask first for an expeditious
22 resolution of these two issues, but certainly that discovery
23 that Rockwell is pushing as fast as it can not continue while
24 this issue hangs over the Court and this case.

25 So, again, subject to -- I can speak to those

1 particular examples of supposed violations of the orders if
2 the Court deems that relevant.

3 THE COURT: Thank you so much.

4 MR. TANCK: Your Honor, if I just may make one
5 response? I just feel --

6 THE COURT: No.

7 MR. TANCK: -- that I was attacked on quoting
8 the record, and I have the record right here. I would really
9 like just for clarification of the record at least on that
10 point --

11 THE COURT: I apologize, but no.

12 MR. TANCK: Okay. Thank you, your Honor.

13 THE COURT: Very good. I think I understand,
14 and I'll take it under submission.

15 I'll issue an order this week, and probably it will
16 be that you haven't established enough, but I'll give you
17 60 days to do jurisdiction discovery only, and I'll resolve
18 the other questions that are presented.

19 Thank you very much for your arguments.

20 -o0o-

21
22 I certify that the foregoing is a correct
23 transcript from the record of proceedings
in the above-entitled matter.

24 /s/Margaret E. Griener 6/4/2014
25 Margaret E. Griener, CCR #3, RDR
Official Reporter

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